SO ORDERED.

SIGNED this 10 day of March, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
TERRY MONROE PIKE and	)	**Case No. 03-16382**
DANA KRISTINE PIKE,	)	**Chapter 13**
	)	
Debtors.	)	
	)	

MEMORANDUM OPINION

This Chapter 13 case is before the Court on the Chapter 13 Trustee's objection to a proposed order, agreed to by the debtor and creditor Wesley Medical Credit Union ("Wesley"), resolving Wesley's treatment under the debtor's plan.[1] Debtor and Wesley agreed that Wesley's contract rate of interest on an oversecured car loan would be raised from 6.9 per cent (as proposed in the debtor's plan) to 7.9 per cent. This case was announced as confirmed by agreement on the March 10, 2004

[1] Unless otherwise noted, all statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq.

docket[2] and the Trustee thereafter submitted an Order Modifying and Confirming Plan, which was entered April 9, 2004.[3] On May 17, 2004, the Trustee filed a Notice of Allowed Claims which provided that Wesley had an allowed secured claim at 6.9 per cent interest under the confirmed plan.[4] On June 30, 2004, Wesley filed a motion to settle journal entry regarding a proposed order or stipulation regarding Wesley's plan treatment, requesting the Court to approve the increased interest rate of 7.9 per cent[5] The Trustee objected to the motion to settle journal entry and the increased interest rate.

Both Wesley and the Trustee submitted briefs on the issue. While Wesley and the Trustee have not filed stipulations of fact, a review of their briefs and the docket report for the case suggest that there are no facts in dispute. After reviewing their briefs and carefully considering the matter, the Court reaches the following findings of fact and conclusions of law.

Wesley values the debtors' van at $10,300 and seeks allowance of its secured claim at $8,747.55 as of November 19, 2003. In its schedules and the plan, the debtors value the van at $12,000. The plan extended what had been a 30 month payout under the loan to 59 months. To protect itself from depreciation of its collateral, Wesley negotiated an agreement with the debtors whereby they agreed to increase the 6.9 percent contract rate on the loan to 7.9 percent. In consideration of this agreement, Wesley withdrew its objection to the plan and the parties announced the case for confirmation. Apparently, the Trustee did not receive word of the interest rate

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[2] Dkt. 22.

[3] Dkt. 27.

[4] Dkt. 29.

[5] Dkt. 30. Wesley subsequently amended its motion to attach the proposed stipulation between Wesley and debtor which the Trustee refused to sign. Dkt. 34.

adjustment in advance, and when she did learn of it, she refused to approve the stipulated plan treatment between Wesley and debtor. In the meantime, the Trustee had submitted an order modifying and confirming plan on the basis of the 6.9 per cent interest rate provided in debtor's plan. Wesley then filed the motion to settle journal entry to bring the issue before the Court and the Trustee objected.

As a preliminary matter, the Court notes that the April 9, 2004 order modifying and confirming the debtors' plan was a final and non-appealable order at the time Wesley and the debtor entered into their "agreed" journal entry." None of the parties has raised the issue of the finality of the confirmation order. The Court is not without concern that the agreed order was essentially a post-confirmation modification, such as that contemplated by § 1329, attempted through the device of an agreed order rather than on notice and hearing as that statute expressly provides at § 1329(b)(2). That said, the circumstances in which this present controversy arises convince the Court that Wesley and the debtors were attempting to remedy what they considered to be a simple omission in the confirmation order with a simple agreed order. Unquestionably the better practice would have been to seek a modification under § 1329, but, because the modification is now squarely before the Court and because the unsecured creditors' interests are well-represented by the Trustee, the propriety of the premium interest rate requested by Wesley and agreed to the by the debtors can be determined on the merits.

Because the vehicle is worth more than Wesley's claim, under § 506(b) Wesley is entitled to have its secured claim allowed at its principal balance plus any interest it accrues at the contract rate, until the date of confirmation. In order to meet the confirmation requirements of § 1325(a)(5), the value of the stream of payments made to the creditor under the plan must, as of the effective date

of the plan, have a value not less than the allowed amount of the creditor's secured claim. Thus, the amount allowed under § 506 is to be repaid with interest over the life of the plan or some shorter period. The rate of interest necessary to keep the present value of the stream of payments consonant with that of creditor's claim is to be determined as set forth by the United States Supreme Court in *Till v. SCS Credit Corp.*[6] The Supreme Court held in *Till*, a case involving an undersecured claim, that the creditor is entitled to the national prime rate plus an adjustment based upon the risk inherent in making the particular loan.[7]

Over the years, both case law and practice have evolved a custom that oversecured creditors are entitled to receive their contract rate.[8] This Court concludes, however, that where a creditor is oversecured and a party in interest objects to payment of the contract rate or higher, the Court may determine the appropriate rate by applying *Till's* formulaic approach: enhancing the national prime rate by a risk factor.[9] In this particular case, there appears to be less risk than is usually inherent in a chapter 13 car loan. Wesley is substantially oversecured. While the plan term is long (59 months) it appears to be feasible at 6.9 per cent. While there is no doubt that creditor would be paid more

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[6] 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed. 2d 787 (2004).

[7] 124 S.Ct. at 1961-62.

[8] *See In re Clark*, 288 B.R. 237, 248 n.32 (Bankr. D. Kan. 2003); *In re Egea*, 167 B.R. 226, 231 (Bankr. D. Kan. 1994); *In re Loveridge Mach. & Tool Co., Inc.*, 36 B.R. 159, 165 (Bankr. Utah 1983); *In re Pikes Peak Water Co.*, 779 F.2d 1456 (10th Cir. 1985).

[9] As discussed in Judge Lundin's treatise, there may be two different interest rates for oversecured creditors governing two different periods: the rate at which an oversecured creditor accrues interest under § 506(b) up to confirmation and the discount rate for payment of present value of the allowed secured claim at confirmation and through the plan under § 1325(a)(5)(B)(ii). *See* 2 Keith M. Lundin, CHAPTER 13 BANKRUPTCY § 116.1 (3d ed. 2000 & Supp. 2004). *See also, In re Harko*, 211 B.R. 116 (2d Cir. BAP 1997), *aff'd sub nom. Key Bank N.A. v. Milham (In re Milham)*, 141 F.3d 420 (2d Cir. 1998), *cert. denied* 525 U.S. 872 (1998).

quickly under its contract, the trustee will supervise the timely making of plan payments and nothing will vitiate creditor's lien position.

Allowing a creditor like this one to secure a premium rate without regard to risk works a hardship on other, junior creditors by diminishing the available disposable income for payment to the unsecured class. Further, this Court is dubious of the proposition that an oversecured creditor is per se entitled to receive its contract rate as an appropriate measure of risk. What if the contract rate in a given transaction was 20 percent? Or 40 percent? In the absence of a demonstration of risk that would justify this Court's enhancement commensurate with the risk, this Court cannot approve a rate simply because it is found in the oversecured creditor's agreement. *Till* requires it to determine what the appropriate risk is and to modify the prime rate accordingly. Otherwise, the balance of power in chapter 13, which is maintained by the statute's reliance on the court's valuation of the collateral and determination of the discount rate, would be tipped in favor of the creditor who, after all, holds many of the cards in its dealing with a chapter 13 debtor.

Here, it appears that the prime rate was approximately 5.50 per cent as of February 14, 2005.[10] A risk enhancement of 1.40 to 5.5 per cent is eminently reasonable where the debtor has extended the loan to 59 months, but where the creditor is oversecured. The prime rate has risen some 1.50 per cent since this case was initially confirmed in April of 2004. Even at that rate, a risk enhancement of 2.9 percent, particularly where the debtors and the Trustee agree to the retention of the contract rate, is not unreasonable. Moreover, the plan is feasible at 6.9 per cent and *Till* instructs bankruptcy courts to consider the effect of the discount rate on the feasibility and success of the plan

[10] *See* http://www.bankrate.com/brm/ratewatch/leading-rates.asp, February 14, 2005.

proposed.[11]

In short, this Court concludes that under § 1325(a)(5)(B)(ii) and *Till*, the appropriate rate of interest to be charged on the repayment of the Wesley loan as of the effective date of the plan is 6.9 per cent. The plan was confirmed on that basis. If any party desires to have an evidentiary hearing concerning any part of the findings set out above or if Wesley seeks to offer evidence bearing on the *Till* analysis, a request for same should be made within ten days of this order. Failing such a request being made to the Clerk in writing, Wesley's motion to settle journal entry is DENIED and the Order Modifying and Confirming Plan entered April 9, 2004 shall stand.

IT IS SO ORDERED.

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[11] 124 S.Ct. at 1961.